**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| MUMIA ABU-JAMAL,<br>Petitioner,<br><br>v.<br><br>MARTIN HORN, Commissioner, Pennsylvania Department of Corrections, ET AL.,<br>Respondents. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>: | CIVIL ACTION<br><br><br><br><br>NO. 99-5089 |

## MEMORANDUM AND ORDER

YOHN, J. July , 2001

Mumia Abu-Jamal ("petitioner") was arrested on December 9, 1981 and subsequently charged with the murder of Philadelphia Police Officer Daniel Faulkner. Following a much-publicized jury trial, petitioner was convicted and sentenced to death.

On October 15, 1999, petitioner filed an action in this court seeking a writ of habeas corpus. In support of his petition, 160 pages in length (with a supporting memorandum 97 pages in length), Jamal has presented twenty-nine claims, with unnumbered but numerous subparts. He separately has moved in a nineteen page filing, plus exhibits, for an evidentiary hearing and/or discovery on some claims and in a 100 page filing, plus exhibits, for this court to set-aside the factual determinations of the state court in whole as unreasonable.

On July 11, 2000, petitioner sought leave to amend his petition to include a thirtieth claim, a Sixth Amendment challenge to the trial court's denial of petitioner's request for the assistance of John Africa at trial. By Order dated March 22, 2001, the court denied petitioner's

motion to amend as moot because the court interpreted petitioner's original claim number eleven to include implicitly this Sixth Amendment challenge. On April 2, 2001, respondent moved for reconsideration of the March 22, 2001 Order, arguing that it allowed a de facto amendment of petitioner's habeas petition. On May 31, 2001, the court granted respondent's motion and vacated the March 22, 2001 Order. Currently before the court is petitioner's motion to amend his petition to include a thirtieth claim alleging that his Sixth Amendment rights were violated when the trial court denied him the assistance of John Africa at trial ("Africa claim").

Petitioner argues that claim eleven embraces implicitly the Africa claim petitioner now seeks to append to his petition for relief. Claim eleven alleges that, in violation of *Faretta v. California*, 422 U.S. 806 (1975), the state court stripped petitioner of his right to self-representation by requiring that voir dire be conducted only by back-up counsel or the court. *See* Pet. for Relief ¶¶ 374-86. Petitioner contends that the trial judge's decision to remove him from pro se status during voir dire was prompted by petitioner's disruptions over the state court's refusal to allow petitioner Africa's assistance. Thus, petitioner reasons that because the two claims are factually entangled, amendment must be permitted.

Respondent essentially answers that petitioner's *Faretta* claim has nothing to do with his Africa claim. As such, because petitioner seeks to assert a completely new claim, because this new claim is barred by the AEDPA statute of limitations, and because the Africa claim does not relate back to any claim in Jamal's petition for habeas relief, leave to amend must be denied. Respondent adds that the Africa claim is unexhausted and procedurally defaulted, and, in any event, is without merit because neither the Constitution nor Supreme Court precedent establishes the right to assistance of a lay person at an accused's trial. I conclude that the Commonwealth is

correct.

A motion to amend a habeas petition is governed by the Federal Rules of Civil Procedure. *See United States v. Duffus*, 174 F.3d 333, 336 (3d Cir. 1999) (citing *Riley v. Taylor*, 62 F.3d 86, 89 (3d Cir. 1995)). Federal Rule of Civil Procedure 15(a) provides that once a responsive pleading is served, a party may amend its pleading only by leave of court "and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Although the grant or denial of a request to amend is within the discretion of the district court, "[t]he Supreme Court has indicated that in the absence of evidence of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowing the amendment [or] futility of amendment,' leave should be freely given." *Duffus*, 174 F.3d at 337 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

One instance where an amendment will be considered futile occurs when the new claim is barred by the applicable statute of limitations. *See, e.g., Duffus*, 174 F.3d at 337. The statute of limitations, however, will not bar an amendment where "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). In that case, the amendment is said to "relate back" to the date of the original pleading. *See id.*[1] Nevertheless, even if the amendment relates back such that it is deemed brought within the statute of limitations, there are other instances where an amendment will be deemed futile. "An '[a]mendment to the complaint

[1]Rule 15(c) sets forth three instances where amendment to a pleading will relate back to the date of the original pleading. The other two instances are not at issue here.

is futile if the amendment will not cure the deficiency in the original complaint or the amended complaint cannot withstand a motion to dismiss.'" *Riley*, 62 F.3d at 92 (citation omitted). In the habeas context, a proposed amendment will be considered futile if the claim is without merit or unexhausted and subject to the procedural default rule. *See Fama v. Comm'r of Corr. Serv.*, 235 F.3d 804, 817 (2d Cir. 2000) (where habeas claim is without merit, amendment under Rule 15(c) will not be permitted, even assuming *arguendo* that the proposed amendment relates back to the original petition); *Riley*, 62 F.3d at 91 (permitting amendment where new claims have arguable merit and appeared to have been fully exhausted and not the subject of a procedural default); *Robinson v. Wade*, 686 F.2d 298, 304 (5th Cir. 1982) (affirming district court's refusal to allow amendment and consider new claims where there was no showing that the claims had been exhausted).

Applying this analysis to the instant motion, it is clear that AEDPA's statute of limitations bars petitioner from now asserting the Africa claim.[2] There is absolutely no mention

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[2]28 U.S.C. § 2244(d) states, in pertinent part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

of the denial of Africa's assistance at trial in any of the documents filed by petitioner between October 15, 1999 and July 11, 2000. More specifically, it is not mentioned in claim eleven. In addition, petitioner himself has styled the proposed Africa amendment as a new claim. Significantly, petitioner cannot claim that the facts regarding Africa that he now wishes to raise could not have been discovered through the exercise of due diligence before now. By arguing that his *Faretta* claim is entangled with the Africa claim, petitioner concedes that he has known of the facts supporting the Africa claim all along. Thus, AEDPA would impose a deadline of October 29, 1999 (one year after the date petitioner's state habeas judgment became final) for bringing this claim. The motion to amend was not filed until July 11, 2000. Clearly, this deadline has passed. *See generally, United States v. Thomas*, 221 F.3d 430, 435 (3d Cir. 2000) (finding that a habeas petition may not be amended after the time limit imposed under AEDPA has passed); *Hull v. Kyler*, 190 F.3d 103-04 (3d Cir. 1999) (same).

It may be true, however, that the Africa claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(ii). While both parties utilize "relation back" language in their memoranda, neither party briefs sufficiently this issue within the proper analytical framework. In any event, because I conclude that the proposed amendment is otherwise futile, I need not decide today whether the

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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
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> (2) The time during which a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C § 2254(d) (Supp. 2000).

Africa claim relates back to the original petition.

Assuming without deciding that the Africa claim relates back, I conclude that the proposed Africa amendment is still futile for two reasons. First, this claim is unexhausted and subject to the procedural default rule. Before a district court can consider the merits of a state prisoner's habeas corpus petition, he must have exhausted all available state remedies. *See* 28 U.S.C. § 2254(b). Petitioner asserts that although the Africa claim was never presented to the state court as a free-standing claim, the Sixth Amendment *Faretta* claim that petitioner did present in state court otherwise encompassed the Africa claim. Petitioner is incorrect. Nowhere in his state pleadings did petitioner argue that he was denied a Sixth Amendment right due to the state court's denial of his request for Africa's assistance at trial. Therefore, I conclude that petitioner has never raised this claim in state court. Moreover, because more than one year has expired after conclusion of direct review of his state court conviction, I also conclude that petitioner is barred from further state post conviction review. *See* 42 Pa. Cons. Stat. § 9545; *Commonwealth v. Cross*, 726 A.2d 333, 335 (Pa. 1999) (applying § 9545 to bar an untimely PCRA claim in a capital case). *See also Campbell v. Meyers*, No. CIV. A. 97-4984, 1999 WL 793509, at *3 (E.D. Pa. Oct. 6, 1999) (examining recent Pennsylvania Supreme Court decisions and concluding that in capital cases, the state court consistently and regularly applied the PCRA one year statute of limitations to bar untimely petitions).[3] Indeed, in his reply memorandum in

[3]It does not appear that any of the exceptions to § 9545 apply to petitioner's Africa claim. *See* 42 Pa. Con. Stat. § 9545 (1) (i), (ii), & (iii) (failure to raise claim is result of government interference, facts upon which claim is predicated previously unknown, and new constitutional right held to apply retroactively). Nor does petitioner assert that any of these exceptions pertain. In any event, § 9545 requires any petition invoking any of these exceptions to be filed within 60 days of the date the claim could have been presented. Clearly, this deadline has passed as well.

support of the instant motion, petitioner concedes that he is barred from further state post conviction review on the Africa claim. *See* Pet. Reply Mem. (Doc. No. 49) at 6. Accordingly, the Africa claim is time barred in state court.

Petitioner asserts that even though the exhaustion requirement has not been met and he is now time barred from presenting his Africa claim to the state court, because the PCRA statute of limitations as applied to petitioner's case is not an independent and adequate state ground to deny relief, the procedural default rule does not prevent petitioner from bringing his claim in federal court. In support of this argument, petitioner cites *Whitney v. Horn*, No. 99-1993, slip. op. (E.D. Pa. June 7, 2000).

In *Whitney*, the petitioner filed an amended habeas petition that set forth seventeen claims and sub-claims for relief. *See Whitney*, slip op. at 2-3. Whitney conceded that he did not pursue, either on direct appeal or in his PCRA proceeding, a number of the claims alleged in the amended petition. *See id.* at 3. As such, many of Whitney's claims were unexhausted. *See id.* Moreover, it was undisputed that due to the newly-enacted PCRA amendments which added a statute of limitations and effectively barred successive PCRA petitions, Whitney had no remaining avenue for litigating any of these unexhausted claims in state court. *See id.* Whitney, however, argued that the statute of limitations, as applied to him, was not an adequate state ground to deny him relief. *See id.* at 6. As such, Whitney's claims were not procedurally barred and could be heard on the merits.

The court agreed with Whitney and held that "[t]he Pennsylvania procedural bar to Whitney's raising the claims he asserts here is not an adequate state ground precluding our review of those claims." *Id*. at 14. The court's holding, however, was influenced by the specific

facts of Whitney's situation. Until the effective date of the PCRA amendments, the Pennsylvania Supreme Court's "relaxed waiver rule" in capital cases and the absence of time limitations on filing successive PCRA petitions were both firmly established and regularly followed practices in Pennsylvania. *See id.* Under those practices, Whitney did not need to raise all post-conviction claims in one petition. Moreover, the court found that Whitney was unable to take advantage of any of the applicable amendment grace periods: (1) the one-year grace period available to petitioners whose judgments had already become final by the amendment's effective date because this period was only applicable to first petitions and Whitney had already filed his first petition by that time; and (2) the 60-day window between the passage and effective dates of the PCRA amendments because Whitney's first petition was still pending during that period and Pennsylvania law did not allow him to pursue a second petition while the first was pending. *See id.* at 10-11. As such, the court reasoned that "Whitney suddenly lost all opportunity to file a successive petition with 'waived' claims." *Id*. 14.

Without determining whether *Whitney* was correctly decided (and it is currently on appeal), I conclude that the case is distinguishable due to the special circumstances which influenced the *Whitney* court's decision. Specifically, one of the court's primary concerns was that Whitney was precluded from bringing any successive PCRA claims due to the fact that he filed his first PCRA petition under the pre-amended PCRA statute, deliberately withheld claims in order to raise them in subsequent petitions, and pursuant to the PCRA amendments was thereafter precluded from bringing those additional post-conviction claims in state court. Petitioner's position, however is unlike Whitney's for two reasons. First, petitioner does not allege that he withheld the Africa claim with the intent to raise it in a subsequent PCRA petition

in order to take advantage of the relaxed waiver rule and to create delay. Rather, petitioner raised the Africa claim at trial, but for whatever reason chose not to pursue it on state direct or collateral review. Second, unlike Whitney, after the effective date of the amended PCRA statute, petitioner took advantage of the opportunity to supplement his PCRA petition on two occasions, by petitioning for and receiving a remand to the trial court to litigate additional claims in October 1996 and June 1997. The Pennsylvania Supreme Court has noted approval of this procedure in instances, such as petitioner's, where a subsequent PCRA petition cannot be filed because review of a pending PCRA petition is still before the highest state court in which review is sought. *See Commonwealth v. Lark*, 746 A.2d 585, 588 (Pa. 2000) (citing Pa. R.A.P., Rule 123, 42 Pa. C.S.A.). Accordingly, I conclude that *Whitney* is properly limited to the specific facts of the *Whitney* case and that the facts in the instant case are not similar enough to warrant application of that holding here. Therefore, the Africa claim is time barred in state court and that petitioner has defaulted his federal claim pursuant to an independent and adequate state procedural rule.

A procedurally defaulted claim may only be reviewed by a federal habeas court if the petitioner shows cause for his noncompliance with the state procedural rule and actual prejudice from the alleged violation, or a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 748-49 (1991), *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995). Petitioner alleges neither. Therefore, petitioner has failed to overcome the procedural bar and this court may not hear his Africa claim. Moreover, leave to amend to add this entirely new and futile claim will be denied. *See generally Thomas*, 221 F.3d at 436 (finding that the district court may, in its discretion, deny an amendment to a habeas petition where petitioner seeks "to add an entirely new claim or new theory of relief").

Perhaps most important of all, the proposed Africa claim is futile for a second reason: there is no Supreme Court or Constitutional authority for petitioner's claim that the denial of the assistance of a lay person at trial contravenes the Sixth Amendment. Moreover, petitioner has failed to point to any. Although petitioner does cite the Supreme Court's *Faretta* decision, that case recognized that a criminal defendant has a constitutional right to represent himself at trial if he makes a clear and unequivocal assertion of this right and a knowing and intelligent waiver of his right to counsel. *See Faretta*, 422 U.S. at 835. It did not create a right to lay representation or even lay assistance at trial.

Indeed, just three years after *Faretta* was decided, the Third Circuit "join[ed] with the impressive array of United States Courts of Appeals that have uniformly rejected the contention that criminal defendants have a constitutional right to be represented by a friend who is neither a law school graduate nor a member of the bar." *United States v. Wilhelm*, 570 F.2d 461, 465 (3d Cir. 1978). More recently, the Supreme Court recognized that the Sixth Amendment right to counsel is circumscribed in several respects: "[r]egardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court." *Wheat v. United States*, 486 U.S. 153, 159 (1988). Thus, it is clear that the Sixth Amendment does not confer a right to representation by a lay person at trial. Although neither court addressed the issue whether the Sixth Amendment right to counsel encompasses the right to *assistance* from a lay person at trial, it likewise follows that no such right exists. In any event, no court, particularly the Supreme Court, has even suggested, let alone found, that the denial of the assistance of a lay person at trial contravenes the Sixth Amendment. Accordingly, petitioner's Africa claim is not cognizable under AEDPA. That is, petitioner cannot demonstrate that the

state court's decision was either "contrary to" or an "unreasonable application of" Supreme Court precedent.

Therefore, because the Africa claim, an entirely new claim premised upon a new legal theory, is futile, leave to amend Jamal's habeas petition to include this claim will be denied.

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| MARTIN HORN, Commissioner, Pennsylvania Department of Corrections, ET AL.,<br>Respondents. | : | NO. 99-5089 |

## ORDER

And now, this day of July, 2001, upon consideration of petitioner's application for leave to amend the petition for habeas corpus relief (Doc. No. 46), respondents' responses (Doc. Nos. 48, 94), and petitioner's reply memorandum thereto (Doc. No. 49), it is hereby ORDERED that the motion is DENIED.

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William H. Yohn, Jr., Judge